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No. 81-97

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

A. O. SMITH CORPORATION, *Petitioner,*

v.

DARREL C. NOTTELSON, *Respondent,*

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Intervenor-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LEE BOOTHBY
1310 St. Joseph Road
Berrien Springs, MI 49103
(616) 471-7787

ROBERT W. NIXON
Johns & Carson
6930 Carroll Avenue
Washington, D.C. 20012
(202) 722-6320

Attorneys for Respondent

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

I. Whether the court of appeals correctly interpreted this Court's holdings concerning religious accommodation under the Civil Rights Act of 1964.

II. Whether the religious accommodation provision of the Civil Rights Act of 1964 is a constitutionally permissible accommodation of the First Amendment right to free exercise of religion that does not violate the Establishment Clause.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 643 F.2d 445 and is Appendix A of the Petition. The opinions of the United States District Court for the Eastern District of Wisconsin, two of which are reported at 481 F.Supp. 756 and 489 F.Supp. 94, are included as Appendix B of the Petition.

SUMMARY

This Court repeatedly has held that when Congress enacted Title VII of the Civil Rights Act of 1964, it expressed its will to place equal employment opportunity and its corollary, non-discrimination in the workplace, high on our national agenda. Such legislation must not be struck down or frustrated except when found to be clearly unconstitutional.

In construing the National Labor Relations Act, courts are required to give proper attention to the broad national policy which embodies the principle of non-discrimination as a matter of the highest priority.

When the Seventh Circuit, in this case, held that the union-security provisions of NLRA do not pre-empt the religious accommodation requirements of Title VII, it became the fourth court of appeals to so rule, and no appeals court has ruled to the contrary.

The appeals court holding in this case carries out the teachings of this Court that when two statutes are capable of coexistence, courts have the duty to regard each as effective. The holding of the court below preserves the integrity of both the National Labor Relations Act and Title VII. It permits the coexistence of union-security clauses and reasonable accommodation for religious dissenters.

The Company would have this Court rule unconstitutional the religious accommodation provisions contained in Title VII and implies that the decisional law on this issue is confused, inconsistent, and inconclusive, requiring the attention of this Court to resolve the issue. To the contrary, all of the federal appeals courts dealing with this issue have totally rejected this contention, as have the vast majority of other courts.

This Court has held that religious accommodations are not necessarily establishments of religion if they are designed to protect free exercise of religion. The purpose of the religious accommodation provision of Title VII was to prevent discrimination in employment and preserve the free exercise of religion. Any benefit which might flow in any particular case to a particular religion through the operation of § 701(j) of Title VII is indirect and insubstantial. The legislation has a primary, secular effect.

The Company argues that Congress can create religious accommodations only for government-imposed obligations, not private ones. This Court, however, has held that federal labor laws giving broad powers to labor organizations involves governmental action. The accommodation required in this case, under the provisions of Title VII, thus involves obligations arising under federal legislation.

The Company claims that § 701(j) excessively entangles government in determinations of what is religious. The focus, however, must be on whether any entanglement is excessive. In all cases where an individual objects on free exercise grounds to a regulation or requirement, the objector must ground the objection upon a sincerely-held religious belief. There is no reason why such inquiry is permissible in free exercise cases but is improper under Title VII. If the government's involvement with religious institutions under § 701(j) is not comprehensive, discriminating, and continuing, then there is no excessive entanglement problem.

STATEMENT OF THE CASE

Plaintiff Darrel Nottelson

During the 27 years that Darrel Nottelson was employed by the Company, he worked in approximately 30 departments and held several types of jobs. At the hearing for preliminary injunction, counsel for the Company described Nottelson as a "long term valued employee." The personnel manager of the Company's Milwaukee works said, "I wish we had a plant full of Nottelsons." When he was fired on July 11, 1975, Nottelson was 43 years old, married, with six dependent children.

Nottelson's Religious Convictions

Nottelson became a member of the Seventh-day Adventist Church in May of 1966. It is an historical position of that denomination that its members should not join or financially support labor unions and similar organizations. There is no question that Nottelson's actions were based upon strongly held and sincere religious convictions.

The Actions of the Parties Prior to Commencement of This Suit

By December of 1974 Nottelson, because of developing religious convictions, felt compelled to sever all ties with the Union. As a result he notified the president of the local union of his decision and requested a meeting.

At this meeting Nottelson discussed his religious convictions. A Church official suggested that Nottelson could be accommodated if he were permitted to pay, in lieu of union dues, the equivalent amount to a non-union, non-religious charitable organization.

Nottelson's church representative explained that the AFL-CIO Executive Council had adopted a policy which recognized religious convictions of an individual who could not participate in labor union membership or financial support and which requested all affiliated unions and internationals to adopt this principle as their policy as well.

The secretary of the local union did contact a regional director of the national AFL-CIO to inquire about the September 20, 1965, "Statement by the AFL-CIO Executive Council on Union Membership and Religious Objectors." The regional AFL-CIO official advised that such a resolution had been adopted and suggested that the local union secretary contact the AFL-CIO headquarters in Washington. He also advised an accommodation

could be made notwithstanding the union-security provisions of the collective-bargaining agreement. The local union president also was aware of the AFL-CIO Executive Council policy and had no question that it was still the policy of the AFL-CIO Executive Council. For this reason he did not feel further need to seek the advice of the national AFL-CIO.

The executive board of the local union ignored the fact that the AFL-CIO regional director had stated that an accommodation along the lines of Nottelson's suggestion was not only permissible but in accordance with AFL-CIO national policy. On April 15, 1975, the Union sent the Company a letter listing those employees, including Nottelson, who had been expelled from the union for non-payment of dues. Two days later the Company issued to Nottelson a notice entitled "Expelled Union Members."

Even though he had no agreement with the Union, Nottelson unilaterally began paying an amount equivalent to union dues to the American Cancer Society in order to show his good faith.

On March 11, 1975, the church's regional Religious Liberty director called the Company personnel manager to discuss the Church's beliefs on labor union membership and to discuss the religious accommodation requirements of Title VII. He gave the Company official the name and phone number of the regional director of the AFL-CIO. The Company official, however, told the Church representative that "he had no relief to offer Mr. Nottelson" inasmuch as the Company was a party to a collective-bargaining agreement with the local union. The personnel manager admitted that neither he nor anyone else in the company did anything as a result of the call.

In April of 1975 Nottelson went to the personnel manager's office to discuss the problem and to inquire if there was any accommodation that the company might be able to make for him. Nottelson advised he had attempted to withdraw from the Union. The Company made no offers. At this meeting Nottelson requested a non-union position with the Company.

The Parties' Actions After Filing Of This Suit

The Union told Nottelson on April 17, 1975 that he would be fired. On April 23 he filed action in the District Court seeking injunctive relief pending final disposition of the charges which had been lodged with the EEOC.

The Company personnel manager called the Union secretary on the morning of April 24, and the Union said Nottelson had no extension of work rights beyond April 24. The Company agreed Nottelson would not be permitted to work beyond April 24. Later that same morning Nottelson told the personnel manager that his attorney was seeking a temporary restraining order to prevent the discharge. In absence of such an order, however, the personnel manager advised supervision at 3:00 p.m. to tell Nottelson that he could not work beyond that day.

On April 30, 1975, the District Court heard Nottelson's motion for a temporary restraining order and issued a temporary restraining order. On May 1 Nottelson returned to work under the TRO.

Nottelson again met with the personnel manager and informed him that he was not getting anywhere with the Union and asked again if the Company had a non-union job which would accommodate his religious beliefs. The personnel manager said that one such job would be as supervisor but because of the economy he did not feel there was any need for Nottelson's services as a supervisor.

Nottelson replied that until the economy improved he would be willing to take any position and, if necessary, go on layoff or unpaid leave of absence or agree to consider any other solution so long as it would not hurt the Company.

On June 2, 1975, EEOC sent a letter enclosing Nottelson's EEOC charge to the Company; it was delivered on June 3. On July 3, EEOC issued its determination that there was reasonable cause to believe that both the Company and the Union had engaged in unlawful employment practices against Nottelson. All of the parties were, pursuant to Section 706(b) of Title VII, invited to join EEOC in a conciliation effort.

On July 10, 1975, Nottelson, the Company, and the Union by their respective attorneys appeared at EEOC for the scheduled conciliation conference. After the conference at which all parties agreed that conciliation efforts had failed, the attorneys for each of the parties signed a memorandum, setting forth their respective positions. The Union stated it was not willing to make any accommodation other than as specified in its May 7 letter, which offered to permit Nottelson to drop formal membership but required he pay dues and fees. The Company claimed only to be a stakeholder. Nottelson claimed that the Union and Company had failed to make or offer any reasonable accommodation.

The District Court on July 10 held that it did not, at that time, have jurisdiction over the matter because a Notice of Right to Sue had not yet been issued by EEOC although its issuance was imminent. Immediately the Company advised Nottelson that the court had not extended the restraining order and that the EEOC conciliation effort had failed. It told Nottelson that as a result he was not to report to work the next day and that the Company would contact him as to the next step.

At the time of this second discharge, Nottelson again asked the personnel manager if the Company would make some type of accommodation. Nottelson again said he would be willing to take a supervisor's job and immediately go on layoff or on unpaid leave of absence. The personnel manager replied, "Negative." The Company, however, made no inquiry of the Union as to the acceptability of Nottelson's proposal.

Nottelson was not considered for a supervisor's position as a method of accommodation because his religion prevented him from working from sundown Friday to sundown Saturday. The personnel manager admitted, however, that although Nottelson sought to be transferred to supervision so as to solve his union problem, the Company did not follow its own procedure to determine whether Nottelson was qualified even to be considered for a non-union supervisory position.

The Company's Affirmative Action Report filed with the federal government for 1975-76 indicated that in production (where Nottelson worked) the Company had an "appreciable number of openings" for supervisors.

When Nottelson at trial was shown the list of supervisory positions filled, he testified that at least seven of the positions filled by transfer were to departments in which he had worked. Nottelson felt that he would have had no problem handling the work of supervisor in any of the departments. Most of the supervisors came from within the ranks. Through the years Nottelson had been approached several times by supervisors inquiring as to whether he would be interested in going into supervision.

On July 11, 1975, the personnel manager called Nottelson to tell him that he was fired as of that date. Nottelson indicated that he had vacation time coming and asked if he could preserve his job pending further court action by

going on vacation. The personnel manager called the local union secretary to see if the Union would consider "such a deviation." She checked with the union executive committee and told the Company their position was "no deviation." The personnel manager called Nottelson and said the Company would not extend the termination date for two weeks even though the collective-bargaining agreement was silent on the question.

On July 11, 1975, Nottelson's counsel wrote to Company counsel advising that Nottelson had been scheduled to be on vacation that particular week but at the request of and as an accommodation to the Company had agreed to work instead. Nottelson was then entitled to six weeks vacation. The letter suggested as a means of providing for a temporary accommodation that Nottelson be "placed on vacation status for such portion of the next six weeks as might be required to obtain injunctive relief." Also, during the interim the Company might be able to find a non-union position. The Company did not respond.

The Company personnel manager admitted that he never called upon the help of EEOC. He also admitted that he did not call upon the State equal employment agency to ask for their assistance.

Other than an initial Company suggestion concerning the holding of the dues money in escrow pending a resolution of Nottelson's EEOC charge, the Company did not have any meetings with the Union to attempt an accommodation. Even when Nottelson was facing discharge during early July, the Company did not call upon the Union to work out an accommodation. The Company also did not seek the help of the AFL-CIO's regional or Washington offices. He also did not seek the help of anyone else involved in Union affairs in trying to work out an accommodation.

The collective-bargaining agreement permitted leaves of absence, and "Corporation Policy" provided for personal leave of absence for non-union salaried employees.

Under the collective-bargaining agreement, when there is a decrease in work force in any department or division and an employee does not have sufficient seniority to remain within his classification, he can "accept a voluntary layoff."

The Company's Affirmative Action Program states that "Blue-collar employees have access to promotion to management or white-collar positions through the Supervisor Candidate Register which is available to all employees."

Non-Discrimination Provision in Union Contract

Although the collective-bargaining agreement contains a union security provision, it also contains a non-discrimination provision, which states in pertinent part: "The Company and the Union agree that there shall be no discrimination because of . . . religion . . . ."

The Chairman of the Grievance Committee of the Union testified that in interpreting other provisions of the collective-bargaining agreement, the particular provision of the contract relating to discrimination had to be considered.

The "Charity-Substitution" Accommodation

Gordon Engen, who now serves as associate director of the Department of Public Affairs and Religious Liberty for the General Conference of Seventh-day Adventists, testified that the "charity-substitution" method of accommodation, which was suggested by Nottelson, had its origin in a labor committee of Congress, had been em-

braced by many labor organizations, including the AFL-CIO, as a workable accommodation acceptable to most individuals holding religious views against union membership and payment of union dues. As a result, the Seventh-day Adventist Church has counseled its members to accept this type of accommodation.

On May 28, 1965, George Meany, president of the AFL-CIO, submitted a letter to the Special Subcommittee on Labor of the House Committee on Education and Labor stating that he was "strongly of the view that unions and employers should undertake to accommodate religious objections with regard to union security arrangements." He added: "I intend accordingly to propose to the AFL-CIO Executive Council that it adopt a strong policy statement to that effect." Less than four months later the Executive Council of the AFL-CIO did, in fact, adopt such a policy statement.

The president of the local union testified that a directly-affiliated union, such as the Defendant Union, answers directly to the AFL-CIO Executive Council. He further stated that the final determination of "matters of national policy" come from the AFL-CIO Executive Council, which formulates national policy.

REASONS FOR DENYING THE WRIT

***"Title VII. . . Concerns Not Majoritatian Processes, But An Individual's Right To Equal Employment Opportunities. Title VII's Strictures Are Absolute And Represent A Congressional Command That Each Employee Be Free From Discriminatory Practices"* — Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).**

THE JUDGMENT OF THE SEVENTH CIRCUIT IS CLEARLY CONSISTENT WITH THE TEACHINGS OF THIS COURT CONCERNING THE ESTABLISHMENT CLAUSE AND DOES NOT CONFLICT WITH THE HOLDINGS OF OTHER CIRCUITS.

Petitioner A.O. Smith Corporation [hereinafter referred to as the "Company"] asks this Court to void the holdings of all the Courts of Appeal that have ruled on the issues involved in this case and to invalidate the will of Congress.

The Company claims that when Congress enacted Section 701(j) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j), so as to insure religious accommodation in the nation's marketplace, it violated the Establishment Clause of the First Amendment. The Company also, in effect, contends that Congress, *sub silento,* left unprotected from the protection of Title VII law a small minority of religious people who sincerely believe that it is wrong for them to join or financially support a labor organization.

The great weight of decisional law absolutely rejects the Company's contentions. To hold with the Company would frustrate the aims of Congress.

Clearly, this Court has the power to strike down an act of Congress that plainly is violative of the Constitution; however, only six acts of Congress have ever been invali-

dated by this Court under the First Amendment. *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965); *United States* v. *Robel,* 389 U.S. 258 (1977); *Schacht* v. *United States,* 398 U.S. 58 (1970); *Tilton* v. *Richardson,* 403 U.S. 672 (1971); *Blount* v. *Rizzi,* 400 U.S. 410 (1971); and *Chief of Capitol Police* v. *Jeanette Rankin Brigade,* 409 U.S. 972 (1972). Only *Tilton* involved the Establishment Clause.

When adding Section 701(j) to the provisions of Title VII in 1972 Senator Williams, the chairman of the Labor Committee and floor-manager of the bill, said:

> As I read the First Amendment of the Constitution there is no problem here presented by the Amendment in connection with the [Establishment] Clause. In dealing with free exercise thereof, really, this promotes the constitutional demand in that regard.

Legislative History of the Equal Employment Opportunity Act of 1972 at 715 (1972). The Senate approved the adoption of Section 701(j) by a vote of 55-0.

Although subject to judicial review, Section 701(j) stands as a congressional command enacted into law by the unanimous decision of the Congress.

I

This Court Has Held That The Elimination Of Employment Discrimination Is A Policy Of The Highest Priority. All Courts Of Appeal Ruling On The Subject Have Held That Employers And Labor Organizations Must Make A Reasonable Accommodation For A Religious Dissenter Who Cannot Financially Support A Labor Organization, Even When The Union Has Negotiated A Union-Security Clause In Its Collective-Bargaining Agreement.

In *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974), this Court dealt with the relationship between rights conferred upon an individual by Title VII and rights bestowed upon employees through the collective-

bargaining process and Sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act (NLRA). That case involved the question of whether an employee's Title VII rights were foreclosed by prior submission of his discrimination claim to binding arbitration under terms of the collective-bargaining agreement. This Court held that arbitration did not bar a Title VII claim. This Court said, "Congress indicated that it considered the policy against discrimination to be of the '*highest priority.*'" *Id.* at 47 (emphasis supplied).

Speaking for a unanimous Court, Mr. Justice Powell emphasized: "Title VII . . . stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices." *Id.* at 51.

The NLRA, on the other hand, expresses a national policy favoring labor peace and encouraging the peaceful settlement of labor disputes affecting commerce. It permits an employer and union to voluntarily enter into a union-shop agreement provided it is valid under the laws of any state in which they are to be performed.

It is clear, however, from the teachings of *Alexander* that in balancing the majoritarian interests under the NLRA with the individual's right to equal employment opportunity, Congress intended Title VII rights to have the "highest priority."

When Congress enacted Title VII, it did not seek to nurture collective interests of the majority at the possible sacrifice of minority rights. To the contrary, the emphasis of Title VII was to disrupt the *status quo* of discrimination which Congress had found to exist.

Thus conduct lawful under the labor law becomes unlawful under Title VII. Compare *Whitfield* v. *United Steel Workers*, 263 F.2d 546 (5th Cir. 1959), *cert. denied*, 360 U.S. 902 (1959) (collective bargaining agreement lawful under labor law), with *Taylor* v. *Armco Steel Corp.*, 429 F.2d 498 (5th Cir. 1970) (identical agreement unlawful under Title VII).

In *Emporium Capwell Company* v. *Western Addition Community Organization*, 420 U.S. 50, 60 (1975), this Court declared that the National Labor Relations Act must be construed "in light of the broad national policy of which it is a part." This Court held that national labor policy embodies the principles of non-discrimination as a matter of highest priority. Therefore in construing the NLRA, courts must not ignore other legislative enactments and public policy.

Title VII's public policy objective of equal employment opportunities regardless of race, sex, or religion and the National Labor Relations Act and its objective of labor peace must be read together to arrive at the proper congressional will. "Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." *Boys Markets, Inc.* v. *Retail Clerk's, Local 770*, 398 U.S. 235, 250 (1970).

Simply stated, Sections 701(c) and (j) require a union to observe, as Justice Powell stated in *Alexander* v. *Gardner-Denver Co., supra*, that although their union has, by law, been accorded certain privileges because of the majoritarian process, individuals who hold religious views that may be different from the majority have also been granted certain rights by law. Congress has stated that in such a confrontation, the individual's rights to

equal employment opportunities, as guaranteed by Title VII, are absolute, as this Court put it, and represent a congressional command that each employee be free from discriminatory practices.

When the Seventh Circuit held that the union-security provisions of the NLRA do not preempt the religious accommodation requirement of Title VII, it became the fourth Court of Appeals to so rule. (App. A-8). The other decisions are: *Cooper* v. *General Dynamics*, 533 F.2d 163 (5th Cir. 1976), *cert. denied sub nom. IAM* v. *Hopkins*, 433 U.S. 908 (1977); *McDaniel* v. *Essex International, Inc.*, 571 F.2d 338 (6th Cir. 1978); *Anderson* v. *General Dynamics Corp.*, 589 F.2d 397 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); *Burns* v. *Southern Pacific Transportation Co.*, 589 F.2d 403 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) and *Yott* v. *North American Rockwell Corp.*, 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 100 S.Ct. 1316 (1980). No Court of Appeals has ruled to the contrary.

The Company also argues that the Court of Appeals has miconstrued congressional intent. It claims the legislative history of Title VII does not contain an expressed congressional intention for accommodation to take precedence over union-security clauses. Petition at 52.

But in *Alexander* v. *Gardner-Denver, supra*, this Court clearly ruled that Title VII takes precedence over rights conferred under collective-bargaining agreements. Title VII itself implies the same, specifically *exempting* bona fide seniority provisions and *not* union-security clauses. (App. A-8). Section 703 of Title VII on its face makes it clear that Congress intended to eliminate religious discrimination by employers and labor organizations. Congress later clarified that intent by adding the reasonable accommodation requirement of Section 701(j). *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 73 (1977).

Among the cases cited by the Company, *Morton* v. *Mancari*, 417 U.S. 535 (1974), stands for the proposition that when two statutes are capable of coexistence, courts have the duty to regard each as effective. The Appeals Court holding in this case permits exactly that, the coexistence of union-security clauses *and* reasonable accommodation for religious dissenters. That coexistence has been approved by the Executive Council of the AFL-CIO, (App. A-10), which 16 years ago issued a policy statement that all international unions affiliated with the AFL-CIO should make accommodations for religious dissenters.

The Company finds no congressional intent that accommodation prevail over union security because Congress considered and rejected several amendments that would have written religious accommodation into the National Labor Relations Act. (App. A-50 and 51). The Company focuses on the 1974 statutory exemption — an *absolute* exemption — for employees in the private health-care institutions. In 1974, however, litigation under Title VII on the subject matter of this case was embryonic at best. Not until 1976, with the Fifth Circuit's *Cooper* decision, did religious dissenters gain a clear legal victory. During this time frame organized labor's representatives were telling Congress that it was *union* policy to accommodate religious dissenters and thus such amendments to the NLRA were unnecessary. *To Repeal Section 14(b) of the National Labor Relations Act: Hearings on S.256 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 89th Cong., 1st Sess. 259-60 (1965) (letter of George Meany, President, AFL-CIO).

The Company grossly distorts the legislative history of H.R. 4774, PL 96-593, a broad religious objector exemption amendment to NLRA Section 8(a)(3) enacted

into law in late 1980 (*see* 49 U.S.L.W. 227) when it states that the enactment of this provision into law makes "it clear that Congress itself did not view Title VII § 701(j) as having the effect of creating such an exemption." Petition at 51.

It is clear that the legislative history of H.R. 4774 refutes the Company's argument and confirms that Congress was, by passing the bill, seeking to reinforce and make even clearer the fact that the charity-substitution type of accommodation offered by Nottelson and rejected by the Union was exactly the type of accommodation Congress itself had in mind when adopting Section 701(j) of Title VII. The purpose of the NLRA amendment was to resolve and stop conflicts and costly litigation such as created by the actions of the Union and Company in this case. One of the co-sponsors of HR 4774 pointed out the *Nottelson, McDaniel,* and *Anderson* decisions and stated:

> The legislative history of the proposed amendment to the National Labor Relations Act indicates that the bill and Title VII were meant to be complimentary. The purpose of the previous bills and the purpose of this bill is to resolve any conflict and to express congressional intent as to the reasonableness of a charity substitution accommodation which all of the federal courts of appeal ruling on the issue have found to be an accommodation acceptable under Title VII.

126 Cong. Record H763 (daily ed. Feb. 11, 1980) (remarks of Rep. Clausen).

The Company cites *Trans World Airlines* v. *Hardison, supra* at 79, to support its contention on congressional intent. Petition at 51. However, the *Hardison* reference is to bona-fide seniority provisions of a collective bargaining agreement, which are specifically exempt from Title VII coverage by Section 703(h) of the Civil Rights Act, 42

U.S.C. § 2000e-2(h), and which this Court described as "universally included in these contracts." *Ibid.* Union-security provisions, however, were *not* exempted by Congress from Title VII coverage. And union-security clauses are *not* 'universally' included in collective bargaining contracts. As the Appeals Court noted, the union-security provisions are unenforceable in states, 20 at last count, with laws to the contrary enacted under 29 U.S.C. § 164(b). (App. A-7). In addition, the more than 2 million federal employees may join labor organizations but cannot be required to join or financially support them. And Congress has exempted religiously dissenting health-care employees from financial support of labor organizations, 29 U.S.C. § 169, which in December 1980 was amended to cover all workers covered by the NLRA.

The Seventh Circuit, in this case, correctly ruled when it joined the three other Circuits in holding that reasonable religious accommodation takes precedence over the union-security provisions of a collective-bargaining contract.

II.

The Section 701(j) Religious Accommodation Requirement Does Not Violate The Establishment Clause Of The First Amendment. Section 701(j) Is An Accommodation Of The Free Exercise Of Religion Clause Of The First Amendment.

The Company claims that the Courts below erred in holding that the religious accommodation requirement of Title VII does not violate the Establishment Clause of the First Amendment.

The Company would have this Court understand that the state of the decisional law on this issue is confused, inconsistent, and inconclusive, thus requiring the attention of this High Court to resolve the issue. Petition at 35

and 36. To the contrary, the vast majority of courts have held that Title VII does *not* violate the Establishment Clause. In addition to the decisions in this case, the courts upholding the constitutionality of Title VII religious accommodation are *Reid* v. *Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972), *rev'd on other grounds*, 521 F.2d 512 (6th Cir. 1975); *Cummins* v. *Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), *aff'd by an equally divided Court*, 429 U.S. 903 (1977), *vacated and remanded on other grounds*, 433 U.S. 903 (1977), *rev'd on other grounds*, 561 F.2d 658 (6th Cir. 1977); *Jordan* v. *North Carolina National Bank*, 399 F.Supp. 172 (W.D.N.C. 1975), *rev'd on other grounds*, 565 F.2d 99 (4th Cir. 1977); *Brown* v. *General Motors Corp.*, 20 F.E.P. Cases 88 (W.D.Mo. 1978); *Burns* v. *Southern Pacific Transportation Co.*, 22 F.E.P. Cases 1229 (S.D. Cal. 1979); *Haring* v. *Blumenthal*, 471 F.Supp. 1172 (D.D.C. 1979); *Tooley* v. *Martin-Marietta Corp.*, 476 F.Supp. 1027 (D.Ore. 1979), *affirmed*, 648 F.2d 1239 (9th Cir. 1981); *Anderson* v. *General Dynamics*, 648 F.2d 1247 (9th Cir. 1981); and *McDaniel* v. *Essex International*, ____ F.Supp. ____, 25 F.E.P. cases 574 (W.D. Mich. 1981).

One of the main cases relied on by Petitioner, *Anderson*, was reversed by the Ninth Circuit on June 23, 1981. Of the four Circuits ruling on the Establishment-Clause issue, *all* have found Section 701(j) to be constitutional. The state of the law on this issue is thus both well developed and consistent.

The Appeals Court decision correctly states and applies the three-prong Establishment Clause test *and* correctly states the relationship of the Establishment and Free Exercise Clauses of the First Amendment.

In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), this Court held that religious accommodations are not necessarily

establishments of religion if they are designed to protect Free Exercise of Religion. Concurring, Mr. Justice Stewart, *id.* at 414, pointed out the "many situations where legitimate claims under the Free Exercise Clause will run into head-on collision with the Court's insensitive and sterile construction of the Establishment Clause." Later he added: "I think that the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief or disbelief." *Ibid.*

In *Walz* v. *Tax Commission of City of New York*, 397 U.S. 664, 668-69 (1970), this Court noted that it "has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." In *Walz*, which involved an Establishment Clause challenge to a property tax exemption for churches, this Court added:

> Governments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms — economic, political, and sometimes harshly oppressive. Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers. The limits of permissible state accommodation to religion are by no means co-extensive with the non-interference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself . . . .

Id. at 673.

This Court also pointed out that the "hazards of placing too much weight on a few words or phrases of the

Court is [sic] abundantly illustrated within the pages of the Court's opinion in *Everson.*" This Court, quoting *Everson,* said "[n]either a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another." This Court pointed out that despite such absolute language, the Court in *Everson* approved tax aid to parochial schools in the form of transportation for parochial students. *Id.* at 670.

Clearly the courts below have correctly applied the Religion Clauses of the First Amendment, as now interpreted by this Court, to the facts of this case.

The Company claims in its constitutional arguments that the purpose of Section 701(j) "was to aid certain sects" that were declining in membership. Petition at 25. However, a reading of the Senate debate on Section 701(j) shows that the goal was not to preserve the Seventh Day Baptist religion or to rescue any other religious group. The Senators involved had as their purpose the prevention of discrimination in employment and the preservation of a constitutional right, the free exercise of religion. *See* 118 Cong. Record 705-06 (1972).

Senator Randolph's references to his pastor's concerns and to the "difficult time" that "certain faiths . . . are having," 118 Cong. Record 705, are illustrations of the problem to be solved by the legislation. Most, if not all, exemptions involving religious beliefs or practices were preceded by some sort of horror story: Mrs. Sherbert, the Seventh-day Adventist, being denied unemployment compensation before the Supreme Court created a judicial exemption; Amish school children being chased through the cornfields by truant officers, and bearded Amish men standing in courts before the educational exemption created by *Wisconsin* v. *Yoder,* 406 U.S. 205

(1972); Internal Revenue Service officials seizing the work horses of Amish farmers before Congress passed a special exemption from Social Security taxation, 26 U.S.C. §1402; nurses and physicians being fired for refusing on religious grounds to participate in abortion procedures in certain federally-funded health care programs before Congress passed protective legislation, 42 U.S.C. § 300a-7.

Senator Randolph's amendment, Section 701(j) must be viewed as a constitutionally permitted secular attempt to define the Title VII obligation of employers to eliminate religious discrimination in employment practices and an attempt to give meaning to the First Amendment's guarantee of free exercise of religion. The Court of Appeals so recognized. (App. A-14).

Relevant also is the fact that Section 701(j) is practically identical to the language of the pre-existing 1967 EEOC Guidelines on Religious Discrimination. The Sixth Circuit had ruled in *Dewey* v. *Reynolds Metals Co.*, 492 F.2d 325 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 698 (1971), that those guidelines were inconsistent with congressional intent and had struck them down. In enacting the 1972 amendment to Title VII, Congress made its intent clear by giving legislative validation to the Guidelines. It was thus EEOC, and not Senator Randolph, that originally developed the reasonable accommodation rule. The Senator's remarks were merely a post-hoc endorsement of EEOC's construction of the religious discrimination provisions of Title VII.

Any benefit which might flow in any particular case to a particular religion through the operation of Section 701(j) is indirect and insubstantial. No financial aid is given to any church. Nor is any financial benefit reaped by Mr. Nottelson, who offered to make a contribution to

charity in lieu of union dues. Religion is aided only to the extent that no price — in the form of job termination — will be extracted for its exercise. That benefit is no different in principle than that accorded an applicant for unemployment insurance who had lost his job because of his or her religious practices. *Thomas* v. *Review Board,* 101 S.Ct. 1425 (1981).

The District Court found that exemption of Nottelson would be only a *de minimis* cost to the Union and would not increase the amount of dues required of his co-workers. (App. A-9). In addition, if Nottelson pays a dues equivalent to a nonreligious, non-union charity he will have no "extra" income with which to support his religion. Certainly such remote aid to religion, coupled with the minimal impact on the Union, does not offend the First Amendment, especially in view of the AFL-CIO policy that such accommodations be made.

Under other statutory accommodations, burdens on others may be much greater. Conscientious objectors may be exempt from service in the armed forces, although, of course, others may be drafted in their place and may be killed. Argument to the contrary is "unsoundness . . . too apparent" to warrant discussion. *Arver* v. *United States,* 245 U.S. 366, 390 (1918). Churches may be exempt from property taxes although, presumably, the exemption increases the property taxes others must pay. *Walz* v. *Tax Commission, supra.* School children may be released to attend religious classes even though one of the adjustments made necessary by the program requires teachers and other students to remain in school. *Zorach* v. *Clauson,* 343 U.S. 306, 324 (1952) (Jackson, J., dissenting). School books and other educational devices bought from funds generated through general tax revenues may be given to children attending religious schools even though the tax burden on all taxpayers may be high-

er as a result. *Wolman* v. *Walter*, 433 U.S. 229 (1977). The minor adjustments required in this case, permitting donation of dues equivalent to a charitable organization for a person whose religion forbids financial support of a labor organization, are therefore, considerably less costly than those the First Amendment has been found to permit.

Additionally, this Court in the parochiaid cases has held that aid to individual members of a particular religion often is permissible "indirect" aid to religious institutions. Illustrative cases include *Everson* v. *Board of Education*, 330 U.S. 1 (1947); *Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) and *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973).

The Company argues that cases such as *Gillette* v. *United States*, 401 U.S. 437 (1971), mean that Congress can create religious accommodations only from government-imposed obligations, not private ones. Petition at 28-29. But since *Steele* v. *L. & N.R. Co.*, 323 U.S. 192 (1944), the Supreme Court has held that federal labor laws giving broad powers to labor organizations do involve State or government action. In *Railway Employees' Dept.* v. *Hanson*, 351 U.S. 225 (1956), this Court declared that a collective-bargaining agreement has "the imprimatur of federal law upon it" and "the federal statute is the source of power" by which individual rights are "lost or sacrificed." *Id.* at 232. The accommodation provided by this Court under Title VII thus involves obligation arising under federal legislation.

III.

Section 701(j) Involves Minimal, Not Excessive, Entanglement Between Church And State.

The Company argues that Section 701(j) excessively entangles government in determinations of what is religious. However, the Supreme Court, again in *Walz, supra* at 679, said: "Determining what acts of government tend to establish or interfere with religion falls well within what courts have long been called upon to do in sensitive areas."

The key in this area is to focus on the *excessiveness* of the entanglement. Common sense indicates that if an exemption is available, those claiming to fall under the exemption may be called upon to show they fall within the exemption. Churches desiring exemptions from property, sales, and income taxes must apply to proper local, state, and federal tax authorities, which in turn determine whether the applicant qualifies for exemption. Religious objectors must present their claims to draft boards in order to receive special classifications.

Obviously, there must be some involvement with religion when the issue involves religion. This Court has noted that the wall of separation between church and state no longer is high and impregnable. In *Lemon* v. *Kurtzman, supra* at 614, the Court noted: "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." And when it comes to evaluating the circumstances of an issue involving establishment of religion, the courts, as the Supreme Court noted in *Walz, supra* at 679, are competent to determine "what acts of government tend to establish or interfere with religion."

As this case demonstrates, it will be rare that government will be required to determine whether a belief is "religious" and sincerely held. To the extent that the latter issue arises, it falls to agencies and courts to determine, as they frequently do, a claimant's credibility. If the religious nature of the objection is seriously called into question, the inquiry is whether an individual's belief is held with the strength of traditional religious views. *See United States* v. *Seeger*, 380 U.S. 163 (1965), and *Welsh* v. *United States*, 398 U.S. 333 (1970). No inquiry into religious doctrine is necessary; it is immaterial that the belief is part of an organized religion or shared by all members of the religion. Determinations of this nature are essentially the same as those which are commonplace for courts and administrative bodies determining conscientious objector status, *United States* v. *Seeger, supra*, and *Welsh* v. *United States, supra*, or the tax exempt status of an organization. *Walz* v. *Tax Commission, supra* at 674-76 and at 698-99 (Harlan, J., concurring).

In all cases where an individual objects on Free Exercise grounds to a regulation or requirement, the objector must ground the objection upon a sincerely-held religious belief. There is no reason why such inquiry is permissible in Free Exercise cases but is improper under Title VII.

The government's involvement with religious institutions under Section 701(j), accordingly, can hardly be characterized as "comprehensive, discriminating, and continuing." *Lemon* v. *Kurtzman, supra* at 619. Rather, it is "'quick and non-judgmental.'" *Roemer* v. *Maryland Public Works Board*, 426 U.S. 736, 764 (1976).

CONCLUSION

No federal court of appeals has rendered a decision in conflict with the decision of the Seventh Circuit in this case. The Seventh Circuit's decision also does not decide a federal question in a way in conflict with a state court of last resort. Thus the Petition should be denied.

Respectfully submitted,

LEE BOOTHBY
1310 St. Joseph Road
Berrien Springs, MI 49103
(616) 471-7787

ROBERT W. NIXON
Johns & Carson
6930 Carroll Avenue
Washington, D.C. 20012
(202) 722-6320

Attorneys for Respondent